SUBJECT INDEX.

	PAGE
Statement	1
Petitioner's Specification of Errors	3
Summary of Argument	5
Argument	6
1. Actual knowledge by the carrier of all information which a written claim would disclose, makes inapplicable a provision of a contract of shipment providing for written claim of loss	6
(a) Such holding brings no doubt or uncertainty into the law of interstate commerce	6
(b) Such holding is not in conflict with decisions of this Court	7
(c) The case involves no important question which should be settled by this Court	11
(d) Such holding is not in conflict with decisions of other Courts of Appeal on the same question	12
(e) State court decisions are not erroneously cited or at variance with any so-called "federal rule"	14
(f) Requiring petitioner to pay for the property it negligently destroyed is not discrimination by carriers between shippers, but is in accordance with the provisions and purposes of the Interstate Commerce Act	16
2. The copies of petitioner's telegrams on file with it reporting the destruction of the carload of paper substantially complied with the bill of lading provision that the carrier have written notice within nine months that the owner of destroyed cargo had a claim for reimbursement	18
Conclusion	20

TABLE OF CASES CITED.

American Railway Express Co. v. The Fashion Shop (1926, Ct. of App. D. of C.), 10 Fed. (2d) 909..... 13

The Argentino (1939, D. C., S. D. N. Y.), 28 Fed. Supp. 440 17

Baldwin v. Atlantic Coast Line R. Co. (1915), 170 N. C. 12, 86 S. E. 776..... 17

The Baltimore and Ohio Railroad Co. v. Leach (1919), 249 U. S. 217..... 9

Barrett v. VanPelt (1925), 268 U. S. 85..... 18

Chesapeake & Ohio R. Co. v. Martin (1931), 283 U. S. 209 8

Clegg v. St. Louis & San Francisco Railroad Co. (1913, C. C. A., 8th), 203 Fed. 971..... 12

Davis v. Henderson (1924), 266 U. S. 92..... 7

Davis v. Roper Lumber Co. (1925), 269 U. S. 158..... 8

Empire Box Corp. v. Delaware, Lackawanna & Western Railroad Co. (1948, C. A. 2d), 171 Fed. (2d) 389.... 7

Georgia, Florida & Alabama Railway Co. v. Blish Milling Co. (1916), 241 U. S. 190.....7, 10, 19

Gillette Safety Razor Co. v. Davis (1922, C. C. A. 1st), 278 Fed. 864..... 12

Gooch v. Oregon Short Line Railroad Co. (1922), 258 U. S. 22..... 8

The Henry S. Grove (1923, W. D. Wash., N. D.), 292 Fed. 502 16

Hopper Paper Company v. The Baltimore and Ohio Railroad Company (1949), 178 Fed. (2d) 179 3

Indiana Harbor Belt R. Co. v. Alpirn (1941), 139 Neb. 14, 296 N. W. 158..... 16

Kidwell v. Oregon Short Line Railroad Co. (1913, C. C. A., 9th), 208 Fed. 1..... 12

Kime v. Southern Ry. Co. (1910), 153 N. C. 398, 69 S. E. 264 15

Lehigh Valley R. Co. v. State of Russia (1927, C. C. A. 2d), 21 Fed. (2d) 396 13

Manby v. Union Pac. R. Co. (1926, C. C. A. 8th), 10 Fed. (2d) 327 12

Metz Co. v. Boston & Maine Railroad Co. (1917), 227 Mass. 307, 116 N. E. 475 15

Midstate Horticultural Co., Inc. v. The Pennsylvania Railroad Co. (1943), 320 U. S. 356 6

Minot Beverage Co. v. Minneapolis & St. Louis Ry. Co. (1946, D. C. Minn.), 65 Fed. Supp. 293 15

Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor (1924), 266 U. S. 200 14

Olson v. Chicago, Burlington & Quincy Railroad Co. (1918, C. C. A. 8th), 250 Fed. 372 12

St. Louis, I. M. & S. R. Co. v. Starbird (1917), 243 U. S. 592 10

Schloss-Bear-Davis Co. v. Louisville & N. R. Co. (1916), 171 N. C. 350, 88 S. E. 476 17

Southern Pacific Co. v. Stewart (1919), 248 U. S. 446 .. 9

Taft & Vandyke v. Atlantic Coast Line R. Co. (1917), 174 N. C. 211, 93 S. E. 752 15

Texas & Pacific Railway Company v. Reiss (1902), 183 U. S. 621 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 665.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner,

vs.

HOPPER PAPER COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The statement in petitioner's brief is incomplete, requiring respondent to make a short statement of the facts complete in itself.

The petition seeks to have this Court review the judgment of the Court of Appeals for the Seventh Circuit which affirms a judgment of the District Court for $4,952.02 for the admitted value of a carload of paper destroyed in transit in a collision between two of petitioner's trains. On August 10, 1945 plaintiff loaded the paper at Taylorville, Illinois and named its Washington, D. C. agent, Stanford

Paper Company, as consignor and the Government Printing Office at Washington, D. C. as consignee. The paper, while in transit and in petitioner's possession as connecting carrier, was destroyed in a collision between two of its trains due to petitioner's carelessness (R. 39).

Two days after the wreck petitioner wired the consignor as follows:

> "PRR 64688 18 skids paper for U. S. Washington D C destroyed in accident.
>
> (signed) C. F. Parks. Balto & Ohio"
> (Ex. 4, R. 57)

and on the same day sent a similar telegram to the consignee (Ex. 3, Rec. 56).

The case was submitted to the District Court for decision on the record. The Court found (Rec. 74-75): that respondent was the owner of the paper so destroyed and the cause of action for such destruction; that the carload of paper was destroyed because of the negligence of petitioner's agents; that the salvage of such paper was sold by petitioner without respondent's knowledge and that respondent neither received such proceeds nor was any tender of the same made to it; that the telegrams mentioned were sent and received; and that petitioner knew it had destroyed the carload of paper and had at least as much if not more knowledge than respondent had in regard to the damage.

The purpose of the fine printed provision of the bill of lading (see R. 7 where the printing is somewhat magnified) quoted by petitioner and the conclusions of the District Court in deciding this case are succinctly set forth in his memorandum opinion as follows (R. 73):

> "A study of the briefs has not convinced me that, under the facts of our case, a formal notice was prerequisite to suit against the R. R. Co. It seems to me that to require this where defendant was already in

possession of at least as much, if not more, information relative to the damages in question as the plaintiff, would be favoring technicalities rather than the realities of the situation. The decided trend of the law is to the contrary.

"To hold that plaintiff must comply strictly with the terms of the bill of lading where defendant was already in possession of all pertinent facts and had itself first given notice to plaintiff of the disaster, would certainly be to require a useless act. This the law does not favor.

"Counsel for plaintiff may submit proposed findings of fact, conclusions of law and a judgment order in favor of plaintiff for the admitted damages.

CHAS. G. BRIGGLE,
United States District Judge."

This decision was affirmed by the Court of Appeals for the Seventh Circuit with Circuit Judge Kerner writing the unanimous opinion of the Court (R. 94-98, 178 Fed. (2d) 179).

Petitioner's Specification of Errors.

The petitioner's specification of errors at pages 13-14 of its brief may be fairly summarized as contending that the Court of Appeals erred in:

1. Holding that actual knowledge by the petitioner of the loss caused by the wreck of its trains and the destruction of the entire carload of paper dispensed with the need for filing a claim in writing as mentioned in the bill of lading.

2. Holding that copies of the petitioner's telegrams on file with it (Ex. 4 and 5, R. 56-57) reporting the destruction of the carload of paper in the wreck substantially complied with the bill of lading provision that the carrier have written notice within nine months that the owner of the destroyed cargo had a claim for reimbursement.

It is the respondent's position that neither of these holdings is erroneous and that neither the decision of the District Court nor the unanimous decision of the Court of Appeals is in error. However, it should be noted that while both of the above holdings are in favor of the respondent, each is independent of the other and sufficient in itself to sustain the judgment sought to be reviewed.

It is also respondent's position that these holdings are limited by the particular facts present in this case, which are not in common in any of the cases relied upon by petitioner. Requiring a carrier to pay for a carload of destroyed paper, when it has full knowledge of the loss caused by its admitted negligence and a written record thereof in its files, will neither "bring doubt and uncertainty into a substantial segment of the law of interstate commerce" (Pet. 14, 16) nor will it "invite unlawful discrimination • • • and thus defeat one of the fundamental purposes of the Interstate Commerce Act" (Pet. 15, 28).

Summary of Argument.

This Court should deny petitioner's application for a writ of certiorari for the following reasons:

1.

ACTUAL KNOWLEDGE BY THE CARRIER OF ALL INFORMATION WHICH A WRITTEN CLAIM WOULD DISCLOSE, MAKES INAPPLICABLE A PROVISION IN A CONTRACT OF SHIPMENT PROVIDING FOR WRITTEN CLAIM OF LOSS.

(a) Such holding brings no doubt or uncertainty into the law of interstate commerce.

(b) Such holding is not in conflict with decisions of this Court.

(c) The case involves no important question which should be settled by this Court.

(d) Such holding is not in conflict with decisions of other Courts of Appeal on the same question.

(e) State court decisions are not erroneously cited or at variance with any so-called "federal rule".

(f) Requiring petitioner to pay for the property it negligently destroyed is not discrimination by carriers between shippers, but is in accordance with the provisions and purposes of the Interstate Commerce Act.

2.

THE COPIES OF PETITIONER'S TELEGRAMS ON FILE WITH IT REPORTING THE DESTRUCTION OF THE CARLOAD OF PAPER SUBSTANTIALLY COMPLIED WITH THE BILL OF LADING PROVISION THAT THE CARRIER HAVE WRITTEN NOTICE WITHIN NINE MONTHS THAT THE OWNER OF DESTROYED CARGO HAD A CLAIM FOR REIMBURSEMENT.

ARGUMENT.

1.

ACTUAL KNOWLEDGE BY THE CARRIER OF ALL INFORMATION WHICH A WRITTEN CLAIM WOULD DISCLOSE, MAKES INAPPLICABLE A PROVISION OF A CONTRACT OF SHIPMENT PROVIDING FOR WRITTEN CLAIM OF LOSS.

a.

Such Holding Brings No Doubt or Uncertainty Into the Law of Interstate Commerce.

The only doubt or uncertainty interjected into the law of interstate commerce is that injected by the petitioner rather than by the decision of the Court of Appeals. At pages 16, 17 and 18 of its brief petitioner repeatedly states that the claim requirement of the bill of lading cannot be "waived", but the entire record and the opinions of both the District Court and Court of Appeals are devoid of any reference to the subject of waiver. In fact, respondent has never contended that petitioner waived any provision of the fine print of its bill of lading. Its contention simply is that (1) when petitioner knew more about the destruction of respondent's property than respondent, itself, there was no necessity to give petitioner notice, and (2) copies of petitioner's telegrams on file with it reporting the destruction of the carload of paper substantially complied with the notice provision of the bill of lading.

To support this mock issue of alleged **waiver** petitioner cites the case of *Midstate Horticultural Co., Inc.* v. *The Pennsylvania Railroad Co.* (1943), 320 U. S. 356. There this Court merely held that the three-year statute of limita-

tions for the recovery of freight charges under an entirely different section of the Interstate Commerce Act could not be expressly waived by a shipper to permit a carrier to recover on a stale freight claim. *Empire Box Corp.* v. *Delaware, Lackawanna & Western Railroad Co.* (1948 C. A. 2d), 171 Fed. (2d) 389, and *Davis* v. *Henderson* (1924), 266 U. S. 92, are to the same effect except that there freight tariff rules were involved. In the cases here under consideration neither any question of waiver, statute of limitations, nor tariff schedule is involved.

The case of *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.* (1916), 241 U. S. 190, cited and quoted from at pages 18 and 19 of petitioner's brief on this same irrelevant waiver proposition is the same case cited by the Court of Appeals (R. 96) below. The principal difference is that the Court below cites and quotes from the case for the germane proposition that the purpose of the notice provision of a bill of lading is "not to escape liability but to facilitate prompt investigation". This Court allowed recovery in the *Blish* case just as did the Court below in the case under consideration. It is submitted that injecting the extraneous issue of waiver in this case does not change the issues or holding of the Court of Appeals and thereby "create doubt and uncertainty in the law".

b.

Such Holding Is Not in Conflict With Decisions of This Court.

At page 20 of its brief petitioner cites six decisions of this Court which it claims are in conflict with the decision below. Four of these six cases are cited in the footnote to the opinion of the Court of Appeals (R. 96) and were distinguished with the following language: " We do not think

it necessary to discuss the cases cited by defendant, for the reason that they are distinguishable on the facts. None of them have passed upon the identical problem with which we are confronted here and hence they are not controlling." This distinction also holds true for the other two cases, but since petitioner endeavors to make such an issue of the matter, we shall, at the risk of lengthening this brief, point out in the order cited by petitioner why each case is not applicable.

Chesapeake & Ohio R. Co. v. *Martin* (1931), 283 U. S. 209, is an estoppel case. It was contended that the failure of the carrier to follow instructions for the delivery of potatoes estopped it from requiring written claim. The Court merely held that these facts were insufficient to raise an estoppel against the carrier. However, it was carefully pointed out that this result was based upon the facts of that case and it is inferred that a shipper might even invoke the doctrine of estoppel. The Court say at page 222:

> "Whether under any circumstances the shipper may rely upon that doctrine in avoidance of the time limitation clause of the bill of lading, we need not now determine."

It is also significant that no brief was filed in behalf of the shipper in that case. With no question of estoppel presented in the case now before this Court the *Martin* case is clearly distinguishable.

Davis v. *Roper Lumber Co.* (1925), 269 U. S. 158, involved a misdelivered car of scrap iron with the question considered by the Court being whether the misdelivery was negligent. No question is considered by the Court as to any knowledge on the part of the carrier as exists in the instant case.

Gooch v. *Oregon Short Line Railroad Co.* (1922), 258

U. S. 22, is a personal injury case in which recovery was denied to the plaintiff, traveling under a drover's pass, because only oral and not written notice of his injury was given. One Justice was absent and three dissented. Apart from the utterly dissimilar factual situation the case is distinguishable because the carrier had no knowledge as to the extent of the injuries, while in the case under consideration the carrier had more knowledge of the destruction of the carload of paper than did respondent.

The Baltimore and Ohio Railroad Co. v. *Leach* (1919), 249 U. S. 217, is a case involving damage to livestock shipped under a bill of lading requiring written claim for damages within five days. Only oral claim was made and this Court in a brief two paragraph opinion with two dissents held that the written claim provision had not been waived. Here, neither oral notice nor waiver is involved.

Southern Pacific Co. v. *Stewart* (1919), 248 U. S. 446, is simply a case of waiver and nothing more. In setting forth the shipper's pleadings the Court say at page 449:

> "* * * that the carrier had repeatedly waived requirement for demand within ten days by recognizing the shipper's right to recover something and attempting to settle and compromise; and that subsequent to October 21st carrier, through its claim agents, had twice attempted to adjust with the shipper the loss and damage sustained."

This Court merely held, with two Justices dissenting, that such negotiations were insufficient to waive the requirement for written claim, saying at page 450:

> "And we also think those opinions make it clear that the circumstances relied upon by the shipper are inadequate to show a waiver by the carrier of written notice as required by the contract."

In the case under consideration there were no negotiations

with respondent and it has never been contended by respondent that there was any waiver.

St. Louis, I. M. & S. R. Co. v. *Starbird* (1917), 243 U. S. 592, involved only an oral notice given to a dockmaster of the condition of five carloads of peaches. This Court merely held that oral notice was insufficient. No oral notice whatever is involved in the case at bar.

Finally petitioner again tries to distinguish the case of *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.* (1916), 241 U. S. 190, quoted from by the Court of Appeals. While a brief telegram in the *Blish* case was held to constitute reasonable notice so as to hold the carrier liable, there were two telegrams sent in the case now before the Court (Exs. 3 and 4, R. 56-57):

> "PRR 64688 18 skids paper from Stanford Paper Co. destroyed in accident." and
>
> "PRR 64688 18 skids paper for U. S. Washington D C destroyed in accident."

Both reveal full knowledge by the petitioner of the loss. If respondent had sent such a telegram to the petitioner instead of vice versa, it would, under the authority of the *Blish* case, be held to be sufficient notice. When the petitioner already had such notice then such notice to it would have been useless.

Another way of stating the same proposition is to use the language of this Court in the *Blish* case in referring to the purpose of the notice provision (p. 198):

> "It is addressed to a practical exigency and is to be construed in a practical way."

Surely it can serve no useful purpose to require a shipper to file a claim giving notice to a carrier of facts which it learned from the carrier itself by its telegram. If the carrier had reasonable notice as this Court points out,

this is the only object of the provision and the carrier thereby may not escape liability for the damage which its admitted carelessness caused merely because the shipper failed to notify the carrier of facts it already knew. Petitioner's knowledge of the loss far outstripped that of respondent because the paper was entirely in its care, the wreck of its own trains caused the damage and the damaged paper, the only real evidence, was inspected and sold by petitioner instead of being delivered in accordance with the contract of shipment.

It is submitted that the decision of the Court of Appeals is not in conflict with decisions of this Court but rather is in accord with them.

c.

The Case Involves No Important Question That Should be Settled By This Court.

It is interesting to note that after strenuously contending under point II (pp. 19-23) of its brief that the decision below is in conflict with settled decisions of this Court, petitioner under point III (pp. 23-24) takes the utterly inconsistent position that the question decided below has not been settled by this Court and that it should now be settled. This time petitioner rehashes the same decisions of this Court previously dealt with, but sets up a new mock issue of **estoppel**, although there is not one word in the opinion of the lower Courts or in the record of this case even hinting at estoppel. Interjecting a mock issue does not create an important question for the decision of this Court but does demonstrate petitioner's ingenuity in throwing up a multitude of contentions which are both inconsistent and without foundation in the record in the hope that certiorari may be granted.

d.

Such Holding Is Not in Conflict With Decisions of Other Courts of Appeal on the Same Question.

In endeavoring to show that the Seventh Circuit is in conflict with other Circuits, petitioner again cites half a dozen cases. In order to show that there is no such conflict we shall briefly analyze each case.

Gillette Safety Razor Co. v. *Davis* (1922, C. C. A. 1st), 278 Fed. 864, was an action to recover the value of a shipment stolen from a carrier. The case was decided on the question as to whether the theft was due to the carrier's negligence or whether it was without fault. It is submitted that this case in no way creates any conflict between the First and Seventh Circuits.

Manby v. *Union Pac. R. Co.* (1926, C. C. A. 8th), 10 Fed. (2d) 327, involved four carloads of sheep accompanied by the owner and consigned to him. En route, with what the carrier considered the shipper's consent, the sheep were delivered to a commission company that in turn resold the sheep. After the commission company failed to pay for the sheep, and a judgment against it was found unavailing, the shipper attempted to hold the carrier liable. The shipper's suit was an afterthought to try to recover his loss from a responsible defendant and oral notice to the carrier was held insufficient. No oral notice is involved in the case before the Court.

Olson v. *Chicago, Burlington & Quincy Railroad Co.* (1918, C. C. A. 8th), 250 Fed. 372, *Clegg* v. *St. Louis & San Francisco Railroad Co.* (1913, C. C. A., 8th), 203 Fed. 971, and *Kidwell* v. *Oregon Short Line Railroad Co.* (1913, C. C. A. 9th), 208 Fed. 1, all involved livestock shipments where loss occurred due to injury to the stock or delay in its receipt. In each case in consideration of a reduced rate

the livestock was shipped under a bill of lading requiring written notice of loss within a short period (usually ten days). In each case oral rather than written notice of loss was given the carrier and in none of the cases was there evidence that it had any other knowledge of the loss. Recovery was denied the shipper in each case. With no oral notice whatever in the case under consideration but with the carrier having full knowledge of the loss it is submitted that the Eighth and Ninth Circuits are not in conflict with the Seventh.

Only a question of waiver was considered by the Court of Appeals for the District of Columbia in deciding the sixth case cited by petitioner, *American Railway Express Co.* v. *The Fashion Shop* (1926, Ct. of App. D. of C.), 10 Fed. (2d) 909. No question of waiver is here involved.

In dealing with the case of *Lehigh Valley R. Co.* v. *State of Russia* (1927, C. C. A. 2d), 21 Fed. (2d) 396, cited by the Court below, petitioner inserts its own language in brackets in the quotation from this case at page 25 of its brief as follows:

"[by the filing of the claim as instructed]"

Such liberties with the language of the Court obviously changes its meaning to suit petitioner's needs.

The point petitioner studiously seeks to avoid by this interlineation is the fact that the requirement in the bill of lading in the *Lehigh Valley* Case was **never** complied with and yet the Court of Appeals permitted recovery because of the carrier's knowledge of the loss as here. In that case, as here, the carrier had full knowledge of the loss and **notified** consignor and consignee thereof. The carrier's knowledge was acquired independently of advice by the owner of the property, which recovered judgment for the loss although it filed no claim that complied with the

bill of lading. It was the carrier's knowledge that brought about recovery and not the language which the petitioner at this late date seeks to engraft upon the opinion. It is submitted that the Court of Appeals clearly understood the opinion in the *Lehigh Valley* case as it was originally written and that such case is definitely in point, particularly since this Court denied certiorari therein (275 U. S. 571).

It s submitted that the Court of Appeals for the Seventh Circuit is not in conflict with the First, Eighth and Ninth Circuits and the District of Columbia and is in accord with the Second Circuit.

e.

State Court Decisions Are Not Erroneously Cited or at Variance With Any So-Called "Federal Rule".

Petitioner's assertion that there are divergent local and federal rules governing the construction of the loss provision of a bill of lading entirely ignores the obvious point that federal and state courts have concurrent jurisdiction to enforce shippers' causes of action against carriers arising under interstate shipments. See *Missouri ex rel. St. Louis, B. & M. R. Co.* v. *Taylor* (1924), 266 U. S. 200 at 208. Both federal and state courts are concerned only with the interpretation of the fine print of a contract of shipment between shipper and carrier, prepared by the carrier and therefore to be most strongly construed against it (*Texas & Pacific Railway Company* v. *Reiss* (1902), 183 U. S. 621, 626). Neither federal nor state courts have any rules of interpretation that are in conflict with each other but all are seeking the common attainment of doing justice between the parties. Many more state decisions have naturally been rendered in the enforcement of shippers' rights and that is why the Court of Appeals cited a number of state cases from the Courts of North Carolina, Tennessee,

Kansas, South Carolina and Missouri as persuasive authority.

While no fault is found with the other state decisions cited by the Court of Appeals, petitioner at page 27 of its brief contends the North Carolina case of *Kime* v. *Southern Ry. Co.* (1910), 153 N. C. 398, 69 S. E. 264, is overruled by the case of *Taft & Vandyke* v. *Atlantic Coast Line R. Co.* (1917), 174 N. C. 211, 93 S. E. 752. This latter case involved an action for $62.89 for damage to furniture shipped under a bill of lading requiring written notice of loss. In the light of the small amount of the damage claimed the carrier had no knowledge of the loss. However, it cannot be urged that petitioner, in the case under consideration, had no knowledge when an entire carload of paper worth more than four thousand dollars was destroyed and the petitioner itself sold the salvage, kept the proceeds, and telegraphed consignor and consignee that the carload of paper had been destroyed in an accident.

Petitioner at page 27 of its brief cites and quotes from the case of *Metz Co.* v. *Boston & Maine Railroad Co.* (1917), 227 Mass. 307, 116 N. E. 475. Here the Massachusetts Court poses the question for decision at page 308 (476) as follows:

> "Therefore, the single question presented is whether such a condition in a bill of lading can be waived under the federal laws relating to interstate commerce."

This case is not in point because it is concerned with a question of waiver when there is no evidence of waiver in the case before this Court.

Other recent federal and state cases that are not cited by the Court of Appeals in their opinion but which also support that opinion are:

> *Minot Beverage Co.* v. *Minneapolis & St. Louis Ry. Co.* (1946, D. C. Minn.), 65 Fed. Supp. 293, 294-296.

The Henry S. Grove (1923, W. D. Wash., N. D.), 292 Fed. 502, 504.

Indiana Harbor Belt R. Co. v. *Alpirn* (1941), 139 Neb. 14, 18-19, 296 N. W. 158, 161.

It is submitted that the decisions of this Court, of the State Courts, and of the Court of Appeals below are all consistent with each other based upon the facts in each case.

f.

Requiring Petitioner to Pay for the Property It Negligently Destroyed Is Not Discrimination By Carriers Between Shippers But Is in Accordance With the Provisions and Purpose of the Interstate Commerce Act.

While the Court of Appeals in the last two paragraphs of its opinion (R. 97-98) very effectively disposed of petitioner's discrimination argument, the same argument is again advanced as the last reason why certiorari should be granted. This is not surprising for whenever the imposition of liability for the damage or destruction of a shipper's property seems certain and all other defenses have failed the carrier, it parades forth the spectre of discrimination to try to shield itself from the wrongs it has inflicted. Such is the case under consideration when petitioner contends the holding below "will permit and invite unlawful discrimination by carriers between shippers".

Clearly, the allowance of a recovery in this case for the admitted value of the cargo where the carrier had full knowledge of the loss caused by its admitted negligence and also had a written record thereof on file with it, cannot be fairly construed as discrimination in favor of the shipper or against the carrier. Obviously, the same rule would uniformly apply under similar facts to all other shippers and carriers.

The cases of *Baldwin* v. *Atlantic Coast Line R. Co.* (1915), 170 N. C. 12, 86 S. E. 776; *Schloss-Bear-Davis Co.* v. *Louisville & N. R. Co.* (1916), 171 N. C. 350, 88 S. E. 476 and *The Argentino* (1939, D. C., S. D. N. Y.), 28 Fed. Supp. 440, cited by the Court of Appeals in the last paragraph of their opinion (R. 98), clearly demonstrate the fallacy of petitioner's argument. It is significant that these cases are completely ignored by petitioner without any attempt to meet or obviate them.

2.

THE COPIES OF PETITIONER'S TELEGRAMS ON FILE WITH IT REPORTING THE DESTRUCTION OF THE CARLOAD OF PAPER SUBSTANTIALLY COMPLIED WITH THE BILL OF LADING PROVISION THAT THE CARRIER HAVE WRITTEN NOTICE WITHIN NINE MONTHS THAT THE OWNER OF DESTROYED CARGO HAD A CLAIM FOR REIMBURSEMENT.

All of petitioner's arguments as to why this Court should grant the writ of certiorari to review the decision of the Court of Appeals are grounded upon the assumption that no written claim was filed by respondent with petitioner within nine months. If a written claim was filed with the petitioner within such nine months the judgment of the Court below is also sustainable without error on this completely independent ground without any need to consider any of petitioner's arguments.

The Court of Appeals also recognized this completely independent ground for holding petitioner liable for the damage it carelessly inflicted when in the last paragraph of their opinion (R. 98), in referring to respondent's claim, it is stated that the petitioner had "a written record thereof in its files". The petitioner placed in its files copies of the telegrams (produced by the petitioner, R. 48-49) sent by it on August 18, 1945, two days after the wreck, to respondent's consignor agent and the consignee stating that the carload of paper was destroyed in the accident.

This was in effect the filing with petitioner of a written claim for the loss of the cargo. It substantially complied with the bill of lading. It was in writing and it disclosed facts showing that the shipper had a claim against the carrier. The petitioner knew the loss had been caused by its negligence and therefore had "reason to expect claim for compensation to be made against it" (*Barrett* v. *VanPelt* (1925), 268 U. S. 85, 90). There is nothing in the bill of

lading requiring the claim to be presented by the owner or to specify the amount of the loss. It is sufficient that it be in writing and disclose that there is a claim against the carrier because of the occurrence. This is sufficient to put the carrier on notice, which is the only reason for the requirement. In *Georgia, Florida & Alabama R. Co.* v. *Blish Milling Co.* (1916), 241 U. S. 190, this Court held a one sentence telegram complied with the written notice provision of the bill of lading and said in regard to the provision at page 198: "—the object of which was to secure reasonable notice." Clearly in the case before this Court the petitioner had in the copies of the telegrams sufficient evidence in writing to put it on notice that there was in fact a claim against it for the destroyed carload of paper. This is all that was necessary under the provisions of the bill of lading.

Thus petitioner's written record of the loss fully supports the judgment below and renders immaterial each of petitioner's points and arguments.

Conclusion.

Despite the fact that it has lengthened this brief we have taken the space to demonstrate the inapplicability of the cases cited or quoted from by petitioner. We have done so in some detail in order to show that these authorities wander off into the by-lanes of discrimination, waiver, oral notice and estoppel and do not consider the issue before the Court: Shall a carrier pay for property consigned to its care which it negligently destroyed and of which destruction it has a written record on file?

We submit that this case presents the simple problem of a carrier that has knowingly destroyed a carload of the respondent's property of admitted value and by its admitted carelessness. The carrier has no justification whatever for its conduct and has made no effort to pay for the damage it has inflicted. Instead it pleads a technical defense asking that respondent inform it in writing of respondent's loss when it well knew and had on file a record of such loss. Neither law nor equity supports such a defense. The decision below is fair and just. If left undisturbed there is nothing about it which will be detrimental to the general state of the law nor to the proper disposition of cases that may hereafter arise.

It is submitted that the judgment of the Court of Appeals for the Seventh Circuit is correct and that the Court should deny its writ of certiorari to review the same.

Respectfully submitted,

HENRY R. BARBER,
VIRGINIA W. BARBER,
CLAYTON J. BARBER,
ALTON G. HALL,
Counsel for Respondent.